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No 317

Supreme Court of the United States.

OCTOBER TERM, 1941.

LINUS C. COGGAN

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

LAWRENCE E. GREEN,
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INDEX.

	Page
Jurisdiction	1
Proceedings below	2
Question presented	2
Summary statement of matter involved	2
Reasons relied on for allowance of writ	4

TABLE OF AUTHORITIES CITED.

Helvering v. Hammel, 311 U.S. 504	4
Helvering v. Nebraska Bridge Supply & Lumber Co., decided March 31, 1941, reversing on certiorari the same case reported in 115 Fed. (2d) 288	3, 4
Jenney v. Tilden, 270 Mass. 92	2
General Laws (Ter. Ed.) chapter 60, section 45	2
General Laws (Ter. Ed.) chapter 60, sections 64 to 69	3
Judicial Code, as amended by the Act of February 13, 1925, section 240 (a)	1
Revenue Act of 1934, sections 23 (e) and (j)	2

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Linus C. Coggan prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled case on May 2, 1941.

Jurisdiction.

The judgment below was entered May 2, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Proceedings Below.

The Board of Tax Appeals decided in favor of the taxpayer on the point herein raised by decision entered November 9, 1939. This decision of the Board was reversed by the Circuit Court of Appeals for the First Circuit. The opinion of the Court is reported in 119 Fed. (2d) 504.

Question Presented.

Where the loss of the taxpayer's investment in real estate occurs as a result of a judicial decree of strict foreclosure or forfeiture on account of non-payment of taxes, and not by reason of any sale, is the loss a capital or ordinary loss under sections 23 (e) and (j) of the Revenue Act of 1934?

Summary Statement of Matter Involved.

The taxpayer was the owner of certain real estate in Boston, the record title to which stood in the name of a straw. The property was assessed by the City of Boston to the straw for the purposes of taxation. Under Massachusetts law the petitioner herein was not personally liable for the taxes, the assessment not having been made against him.

In 1930 on account of default in the payment of taxes the property was "sold" to the City of Boston. General Laws (Ter. Ed.) chapter 60, section 45, provides that "the title conveyed shall be held as security for the repayment of the purchase price with all intervening costs . . ." and consists merely of a lien, the holder of the right of redemption being considered as continuing to be the owner of the land. *Jenney* v. *Tilden*, 270 Mass. 92.

The only method provided for foreclosing the security title or lien thus created is by petition for foreclosure

brought in the Land Court not sooner than two years after the so-called "sale." General Laws (Ter. Ed.) chapter 60, sections 64 to 69.

In 1935, the tax year in question, a decree of strict foreclosure or forfeiture was entered by the Land Court foreclosing all rights of redemption.

The Circuit Court of Appeals for the First Circuit in effect agreed with the petitioner herein that the foregoing states a case of loss in 1935 through forfeiture and not a loss through sale, stating in its opinion:

> "As a fresh question we should have had difficulty in saying that the extinguishment of the taxpayer's interest by the decree of the land court in 1935 foreclosing his right of redemption after the so-called tax sale in 1930 was a 'sale or exchange' within the meaning of the statute. There is some force to the contention that the *Hammel* case, and our decision in *Welch* v. *Street*, 116 F. (2d) 953, are distinguishable in that in each of these cases the taxpayer's interest was extinguished by a 'sale', namely, a foreclosure sale in which the property was actually sold to the highest bidder; whereas in the case at bar the property was not put up for sale in 1935, but the taxpayer's right of redemption was forfeited in that year by the decree of the land court. . . ."

The Court, however, went on to state that a decision against the taxpayer was required by the decision of this Court in *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, decided March 31, 1941, reversing on certiorari the same case reported in 115 Fed. (2d) 288.

Reasons Relied on for Allowance of Writ.

1. The decision in this case is in conflict with the opinion of the Supreme Court in *Helvering* v. *Hammel*, 311 U.S. 504. In that case this Court said, page 512:

> "Respondents also advance the argument, sustained in *Commissioner* v. *Freihofer*, 102 F. 2d 787, that the definitive event fixing respondents' loss was not the foreclosure sale but the decree of foreclosure which ordered the sale and preceded it. But since the foreclosure contemplated by the decree was foreclosure by sale and the foreclosed property had value which was conclusively established by the sale for the purposes of the foreclosure proceeding, the sale was the definitive event establishing the loss within the meaning and for the purpose of the revenue laws. . . . The sale, which finally cuts off the interest of the mortgagor . . . is a means adopted by the statute for determining the amount of his capital gain or loss from the sale of the mortgaged property. . . . But there is nothing in this record to show that the land contract in this case contained a forfeiture clause. Even if it did, it does not appear that there was in fact a forfeiture apart from the sale on foreclosure. . . ."

It is respectfully submitted that the decision below ignores the distinction made in the *Hammel* case between a loss by forfeiture and a loss by sale.

2. *Helvering* v. *Nebraska Bridge Supply & Lumber Co.* is distinguishable.

Under the Arkansas law, involved in that case, there was an actual sale, although subject to a right of redemption terminating upon the mere expiration of a fixed period of

time and the execution of a deed by the proper officer, a purely ministerial and clerical act. Under these circumstances "the sale was the definitive event . . . which finally cuts off the interest" of the owner. In the case at bar the definitive event was a judicial decree entered in a plenary suit, a fact which is recognized by the court below.

3. Obviously the question involved in this case is one of frequent recurrence, not only in the Commonwealth of Massachusetts, but in such other states as may have similar laws relative to the taxation of real property. As such the matter involved is one of general importance.

Respectfully submitted,

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